19-7936

No. _____

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

JAMES ZAVAGLIA,

Applicant,

v.

BOSTON UNIVERSITY SCHOOL OF MEDICINE,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the lower courts are correct to apply this Court's decision in University of Texas Southwestern Medical Center v. Nassar, 133 S. Ct. 2517 (2013), to cases brought under the Family and Medical Leave Act of 1993 and require plaintiffs asserting claims for interference and retaliation in violation of that statute to prove but-for causation rather than the motivating factor causation.

2. Whether the regulations of the United States Department of Labor providing for a mixed motive or motivating factor standard to apply to claims brought under the Family and Medical Leave Act of 1993 are entitled to controlling deference under this Court's decision in Chevron v. Natural Resources Defense Council, 467 U.S. 837 (1984).

3. Whether Petitioner James Zavaglia was erroneously denied a jury trial on his claims for interference and retaliation in violation of the Family and Medical Leave Act of 1993 when it was explicitly found that the Respondent gave one rationale for his termination at the time he was terminated and discovery evidence shows a different rationale later, by presenting other substantial evidence that his request for leave was a motivating factor in the termination decision.

4. Reeves v. Sanderson Plumbing Products, Inc., held in an action under the Age Discrimination in Employment Act, that a plaintiff may ordinarily prove the existence of an unlawful motive by establishing a prima facie case and demonstrating the falsity of the employer's proffered explanation for the disputed employment, and that a plaintiff who does so need not also offer some other additional evidence of discrimination. That the existence of an unlawful motive may not be established in that manner; a plaintiff who establishes a prima facie case and the falsity of an employer's proffered reason is required to also adduce additional evidence of discrimination. The question presented is: Does the standard of proof established by Reeves apply as part of the civil action.

5. That two judges with ties to the Respondent had to be recused from the rehearing and rehearing en banc proceedings possibly within the parameters of 28 U.S. Code § 455. Should the Appeals Court have called upon guest judges so that the Plaintiff-Appellant could have had the benefit of an en banc panel in its entirety.

6. Terminating the Pro Se Applicant while he was on intermittent Family Medical Leave Act for medical situations stemming from an assault on the job by a fourth year medical student, which caused a permanent back and hip injuries resulting in

the petitioner being put on social security disability, who is now a practicing doctor because the assault was covered up by upper management within the University. Should the University be held and individuals be held criminally responsible for their actions with retaliation with the advent of such cases as ERIKA DAVIS v. MICHIGAN STATE UNIVERSITY; THE BOARD OF TRUSTEES OF MICHIGAN STATE UNIVERSITY; LAWRENCE GERARD NASSAR (individual capacity only); KATHIE KLAGES (individual capacity only); WILLIAM D. STRAMPEL, D.O. (individual capacity only); JEFFREY R. KOVAN D.O. (individual capacity only); DOUGLAS DIETZEL, D.O. (individual capacity only); BROOKE LEMMEN, D.O. (individual capacity only); GARY E. STOLLAK (individual capacity only); DESTINY TEACHNOR-HAUK (individual capacity only); USA GYMNASTICS, INC.; TWISTARS USA, INC. d/b/a GEDDERTS' TWISTARS USA GYMNASTICS CLUB, and JOHN GEDDERT, 1:18-cv-01046 (other citation omitted), and the 55 connected cases to Michigan State University which resulted in resignations, terminations, criminal charges, sanctions and damages awarded due to the cover up on the part of the University and it's agents.

LIST OF PARTIES

Petitioner, plaintiff Pro Se, is James Zavaglia.

Respondent, defendant is, Boston University School of Medicine.

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PETITION FOR WRIT OF CERTIORARI

James Zavaglia respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the First Circuit.

OPINION BELOW

The opinion of the United States Court of Appeals for the First Circuit in this case is reproduced in Appendix "A". The opinion of the United States District Court for the District of Massachusetts, granting summary judgment for the Respondent is reproduced in Appendix "B". The opinion of the denial of rehearing is reproduced in Appendix "C".

JURISDICTION

The opinion of the United States Court of Appeals for the First Circuit affirming the district court's judgment was entered on October 31, 2019. A timely petition for rehearing was filed. The petition for rehearing was denied by the First Circuit on December 10, 2019. This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

RELEVANT STATUTORY PROVISIONS

This petition involves the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634.

Section 4(a) of the ADEA provides: It shall be unlawful for an employer –

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age;

(3) to reduce the wage rate of any employee in order to comply with this chapter.

29 U.S.C. § 623(a).

the Americans with Disabilities Act (ADA), 42 U.S.C. § 12112(a) provides:

(a) General rule

No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

This petition turns on the anti-interference provisions of the Family and Medical Leave Act (FMLA), which provides that "it shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this subchapter." 29 U.S.C. § 2915(a)(1).

Also 29 CFR § 825.201 Leave to care for a parent.

(a) General rule.

An eligible employee is entitled to FMLA leave if needed to care for the employee's parent with a serious health condition.

STATEMENT OF THE CASE

This case involves the interference and retaliation provisions of the Family and Medical Leave Act of 1993, 29 U.S.C. § 2615(a)-(b), one of the implementing regulations for that statute promulgated by the United States Department of Labor, 29 C.F.R. § 825.220(c), and this Court's interpretation of the retaliation provision of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-3.

The Act's prohibition against interference prohibits an employer from discriminating or retaliating against an employee or prospective employee for having exercised or attempted to exercise FMLA rights. By the same token, employers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions; nor can FMLA leave be counted under no fault attendance policies. See 29 C.F. R. § 825.215.

The case also has the effects of age discrimination. The ADEA is firmly grounded in and an integral part of this nation's civil rights legacy. Its enactment in 1967 was "part of an ongoing congressional effort to eradicate discrimination in the workplace," and "reflects a societal condemnation of invidious bias in employment decisions." McKennon v. Nashville Banner Co., 513 U.S. 352, 357 (1995). "The ADEA is but part of a wider statutory scheme to protect employees in the workplace nationwide." Id. (listing other civil rights statutes that, along with the ADEA, protect employees from discrimination in the workplace) or other employment

statutes that are similar to Title VII's retaliation provision in this respect. For example, the ADEA makes it unlawful for an employer to take adverse action against an employee "because of such individual's age," 29 U.S.C. § 623(a), or "because" the employee opposed an unlawful practice or participated in protected activity. Id. § 623(d). In Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000), this Court set out, in a case under the Age Discrimination in Employment Act ("ADEA"), a general standard for resolving discrimination claims. Reeves held that a plaintiff can ordinarily demonstrate the existence of an unlawful motive by establishing a prima facie case and by showing that the employer's proffered explanation for the disputed action is false. Reeves expressly rejected a line of cases which had held that a plaintiff, over and above proving that the employer lied about its motives, must also adduce some additional evidence of discrimination, a requirement that in practice had often been impossible to meet.

Another factor in this case is 29 U.S.C. § 623(a). The Americans with Disabilities Act (ADA), 42 U.S.C. § 12112(a) provides: (a) General rule No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment. concerning the Pro Se Applicant being disabled due to a workplace assault by a fourth-year medical that was covered up with full knowledge of upper management and was ultimately terminated while on accepted intermittent FLMA seeking medical attention to resolve the injury.

1. Factual Background

Applicant filed a complaint with the EEOC in April 2013 claiming he was discriminated against on the basis of disability citing the Americans with Disabilities Act of 1990, as amended, 42 U.S.C. Sec. 12101, et seq., for employment discrimination on the basis of a disability against a private employer. Jurisdiction is specifically conferred on the Courts by 42 U.S.C. Sec 2000e-5(f). See 42 U.S.C. Sec. 12117 (a). Equitable and other relief is

sought pursuant to 42 U.S.C. Sec. 2000e-5(g). After corresponding with the EEOC, A letter from the EEOC, dated included a charge of age discrimination citing Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C Sec. 621, et. seq., for employment discrimination based upon age. Jurisdiction is alleged pursuant to 28 U.S.C. Sec. 1331, 1337, and/or 1343. Equitable and other relief is sought under 29 U.S.C. Sec. 626 (b) and (c) or Sec. 633a(b) and (c). and retaliation citing 42 U.S. Code § 12203 - Prohibition against retaliation and coercion. After an investigation by the EEOC. The investigation was closed in July 23, 2014 and a right to sue letter was issued by the EEOC. Zavaglia was terminated on October 7, 2014 while on intermittent Family Medical Leave Act trying to resolve back injuries sustained by an assault by a fourth-year medical student who is now a practicing doctor this assault was covered up by upper management. An action was filed on October 16, 2014 in Federal District Court as a Pro Se **SEE CIVIL ACTION NO: 1:14-CV-13924-IT DOC 1**. An amended complaint was filed on March 3, 2016 **SEE DOC 35**. On November 29, 2017, the District Court held a hearing on Defendant's Motion for Summary Judgment. On January 08, 2018, the District Court granted summary judgment in Defendant's favor. In its decision, the District Court held that "the evidence of record demonstrates Plaintiff is unable to establish a prima facie case" of disability discrimination. In making this determination, the District Court disregarded evidence, the Plaintiff presented in the form of medical records, facts and doctor's notes that proved the Plaintiff was disabled from the assault by the fourth year medical student the university played a role in the assault by covering up criminal activity that was witness in part by another employee also the Plaintiff's medial conditions were worsening as time went on due to the assault also the Plaintiff was

suffering paradoxical symptoms also from the assault and because the university's risk management department informed the Plaintiff's supervisor that only allowed three physical therapy appointments in a sense not acknowledging the assault as part of a workman's comp situation. Plaintiff had to his health insurance with its limits on appointments and having to pay the various copays. The District Court also ignored evidence that Defendant deviated from University hiring requirements. The Plaintiff was passed by for promotion in the Educational Media Department 5 times they either had a letter placed in their HR file or had baseless and unfounded accusation made against the Plaintiff. on Nov. 14, 2012, soon after they applied for a position in the dept., a letter was put in their file for being late even though they were on Intermittent FMLA for an on the job back injury sustained in 2001 and was reinjured during a 2005 workplace assault that was covered up. They have asked many times since 2001 to have a schedule adjustment and was denied. they went on FMLA in 2011 they were finally given the forms for a schedule adjustment from the equal opportunity office of the university on Nov. 14, 2012 during a meeting at HR with my dept. upper management. This is the same day they put the letter in their HR file mentioned above. During the Plaintiff's employment three other dept. employees have been granted schedule adjustments due to medical concerns. On May 29, 2013, when Plaintiff was on vacation, on or about 3:15 Plaintiff received a departmental email from upper management stating a new Educational Technologist was hired and would be starting July 1, 2013. Plaintiff had applied for this Position on or about October 20, 2012. It was several weeks after Plaintiff applied online that Plaintiff was called into HR and given the letter that was put in Plaintiff personal file and at the same time given the form from the EEOC office to adjust their schedule as

stated above. Plaintiff was never approached by upper management about the position even though They had the qualifications or given any acknowledgement nor was ever given an interview for the position. Plaintiff had applied for same position preciously and before they could get an interview, they were called in by B.U. police stating that an employee filed a charge against me saying that the Plaintiff was bringing a gun to work. The accusation was false and to this day the Plaintiff has tried to find out who filed the charge against them, which is the Plaintiff's right under the law, but this has been blocked by B.U. police. The Plaintiff also applied for a Library Assistant position on the B.U. Charles River Campus they were never given an interview even though the plaintiff was qualified. After the job was filled, the Plaintiff received an email from CRHR thanking the Plaintiff for showing up for an interview. The Plaintiff forwarded the email to the MED campus HR representative they were working with at the time concerning the applying for FMLA due the medical issues that are part of this court action and trying to right a monetary compensation issue due to the fact that the Plaintiff was a pay grade below the other technicians including a night technician that was still in college and attending classes in the morning and was the lowest payed employee in the Educational Media Department even though the Plaintiff had a master's degree in Educational Media and the other technicians did not. Another example of retaliation happened in 2008 The Plaintiff applied for a supervisor's position in the dept. The job interview consisted of the executive director telling me The Plaintiff would not get the job because they heard The Plaintiff had said some inappropriate banter; also, that Plaintiff had answered back their job evaluation and didn't use it as a tool for growth. The Plaintiff said they would like to face their accuser and they had a right to answer back anything on their evaluation they did not agree with and to provide information to clarify any content that was in dispute. Upper

management and HR did nothing to investigate the situation even though the Plaintiff requested an investigation. The District Court Also Erred by dismissing the Plaintiff's ADEA Claim with prejudice and instructing the Plaintiff to submit an amended complaint because of Defendant moves to dismiss Plaintiff's ADA count on the grounds that he failed to exhaust his administrative remedies, failed to state a claim for disability discrimination, and failed to comply with the "short and plain statement" requirement of Federal Rule of Civil Procedure 8(a). Plaintiff's ADA claim is dismissed without prejudice because of his failure to comply with Rule 8(a). Accordingly, Plaintiff's complaint will be dismissed with leave to file an amended complaint that comports with Rule 8(a)(2). **SEE DOC 33** Plaintiff has tried to comply with all federal rules and local rules to submit documents. In checking with the Pro Se office, the Clerk's office, and online and other resources, have indicated that Pro Se Litigants are not held to the same standards as a practicing attorney, that does not mean the person representing themselves as a Pro Se cannot take proceedings seriously but when they are summiting documents for the action though they may be not as formal but if they have true facts, they are part of the records. In preparing for the District Court action and these actions the Plaintiff has observed online examples of Pro Se and attorney summited documents. Plaintiff has always tried to comply by using the format of different court actions as a template for Plaintiff's summited documents. Plaintiff thought they were complying with Rule 8 when submitting documents previous to the Order on Motion to Dismiss for Failure to State a Claim. (**DOC 33**) Both the PLAINTIFF'S RESPONSE AND OPPOSITION TO DEFENDANT TRUSTEES OF BOSTON UNIVERSITY'S MOTION TO DISMISS THE COMPLAINT (**DOC 24**) and SURREPLY IN OPPOSITION TO DEFENDANT'S DEFENDANT TRUSTEES OF BOSTON UNIVERSITY'S REPLY

MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS THE COMPLAINT (DOC 31) show that the Plaintiff was attempting to comply and follow the Federal rules and local rules. The Plaintiffs ADEA claim should be reinstated because of age discrimination the Plaintiff was terminated at age 53 while on approved intermittent FMLA and trying to resolve medical issues due to the assault and coverup mentioned above. There are other numerous incidents including allegations including not being in the office for technical questions. The fact is the plaintiff was in the office and many times and management would pass the plaintiff by and ask the other techs (who were younger than the Plaintiff) questions that the Plaintiff knew the answer to, or if there was a troubleshooting situation or a technical meeting the other techs would attend, and the plaintiff was told to stay at my desk and was not included. PLAINTIFF'S RESPONSE AND OPPOSITION TO DEFENDANT TRUSTEES OF BOSTON UNIVERSITY'S MOTION TO DISMISS THE COMPLAINT (DOC 24) and other Plaintiff documents contains a record of the hostile and toxic working environment, the Plaintiff had to endure will working at the university. The references to the factual source materials. In (DOC 24) and the accompanying exhibits that are part of that document it shows the flawed investigation process of the EEOC investigator who did not give the Plaintiff the right to the full benefit of the process. The EEOC and its website states that a person making a complaint will meet with an investigator for up to two hours. When the Plaintiff met with the investigator for approximately less than 50 minutes. they told me right away he would not investigate the complaint The Plaintiff tried to show papers the Plaintiff had brought with them and the investigator refused to look at them during that time they told the Plaintiff their grandson was a first-year medical student at the BU School of Medicine at that time. they also told the Plaintiff that they should talk to the Educational Media

Center Director The investigator said, "I know him he's a nice guy". I asked the investigator several times how he knew the Director, was it socially or with dealings with the EEOC. The investigator said that the Director had a complaint put against them in the past. the Plaintiff informed the investigator that this is a conflict of interest and the Plaintiff wanted to speak with another investigator or talk to the person above the investigator. The investigator said they would not do that, and they had other things to do. The investigator then escorted the Plaintiff out of the EEOC office. After that the Plaintiff called the main office of the EEOC in Washington and the EEOC Inspector General's office and reported the above incident and explained that they had read the EEOC website and that their right to the full benefit of the process was violated. The Plaintiff was put in contact with the acting director of the Boston office who restarted the complaint process. This meeting had an impact on a hearing the Plaintiff attended a hearing at the Massachusetts Commission Against Discrimination (MCAD) (**SEE ALSO DOC 24)** and met with an investigator and the Defendant's Lawyer and their intern. After hearing testimony from both sides, the investigator said that they would be putting great weight on EEOC decision. Plaintiff explained about the meeting with the EEOC investigator as described above and that the investigation might be flawed. The Plaintiff also stated that from what they understood they would be able to submit additional information at the hearing and had a brief case and a small duffel bag full of papers with them. they were representing they were representing themselves Pro Se even after submitting additional documents after the hearing the MCAD investigator still used the EEOC decision to rule against the Plaintiff. The reason why the Plaintiff was on intermittent FMLA when terminated because the Equal Opportunity Office at the university failed to approve an accommodation for the Plaintiff's disability. The PLAINTIFF'S RESPONSE, OPPOSITION AND RULE

56.1 COUNTER STATEMENT OF UNDISPUTED MATERIAL FACTS TO DEFENDANT TRUSTEES OF BOSTON UNIVERSITY'S MOTION FOR SUMMARY JUDGMENT, AND DEFENDANT TRUSTEES OF BOSTON UNIVERSITY'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT and the PLAINTIFFS'S RULE 56.1 COUNTERSTATEMENT OF UNDISPUTED MATERIAL FACT **(SEE DOC 76,77)** and the accompanying exhibits shows how the university and their agents did willingly cause the Plaintiff harm by not acknowledging the disability, the assault and the ongoing medical problems suffered by the Plaintiff that have gotten worse with age. The exhibits also show the student made a false statement of what they did to the Plaintiff at the occurrence of the assault which was refuted by a witness and the Plaintiff's Doctors, also the Plaintiff had asked for a record of any statements or investigations in 2005 and was not given any records until the discover process of the civil action which is a violation of the Plaintiff's legal rights. The Defendant said in its documents that the Plaintiff was failing in their job. the fact is Plaintiff was not only working 60 to 70 hours a week as a salaried employee with no overtime and while trying to resolve significant medical issues Plaintiff has substituted for many department employees for their vacation's, academic classes, and medical issues and was on intermittent family medical leave act. **(DOC 76, 77)** and PLAINTIFF'S MOTION TO APPOINT COUNSEL **(SEE DOC 15, 59)** and other documents related to the action shows the family and personal medical problems, including cognitive issues the Plaintiff has suffered. The Plaintiff's doctors have said that a doctor because of specialized knowledge can inflict the most harm on the human body if they choose to. Also, the fact that the Plaintiff had an on the job back injury and assault by the plaintiff's supervisor, which also had witnesses, in 2001 and was close to being fully resolved when the 2005 assault

happened, Plaintiff did tell the student about the 2001 injury beforehand, proves malice on the part of the student because of the Plaintiff's permanent injures, and the university, because of the coverup. The Plaintiff's doctors have said the Plaintiff would have made a full recovery from the 2001 injury and would not have some of the other medical problems the Plaintiff suffers from if the assault didn't happen. Also, in their action documents the Defendant is focusing on the effects of what was happening to the Plaintiff and impact to the Department and not the cause of the of the assaults and the illegal and criminal activities including cover ups, hostile work environment while Plaintiff was trying to resolve medical issues at the hand of the university who in all these proceeding pretend to be the victim, it's agents, and members of the university student community, FMLA violations 29 U.S. Code Sec. 2612 (b), 29 U.S. Code sec 2615 (a), 29 U.S. Code Sec 2618 (c). In the SURREPLY IN OPPOSITION TO DEFENDANT'S REPLY MEMORANDUM IN FURTHER SUPPORT OF DEFENDANT TRUSTEES OF BOSTON UNIVERSITY'S MOTION FOR SUMMARY JUDGMENT **(SEE DOC82).** "Plaintiff has been told they were a victim by various social agencies helping Plaintiff. during this and are shocked by the information relayed to them by the Plaintiff about the Plaintiff's work situation. Also, the social and advocacy groups, elected official and their legal resources, the Plaintiff has reached out to for help with public assistance programs for himself and their wife have been very supportive. They have noted that that the Plaintiff has come very far in the court proceedings and that there seems to be some form of merit with the case. They, of course cannot give any legal advice but have pointed to additional legal resources that the Plaintiff was unaware of before. "An action was filed on October 16, 2014 in Federal District Court as a Pro Se. and moved to the Federal Appeals Court on February 2, 2018.

Applicant worked for the Defendant for approximately 16 years before Defendant terminated his employment on October 7, 2014. Zavaglia obtained a bachelor's degree in general studies with a Concentration in Photography/Video and Minors in Media Communications, English, and Political Science. Before coming to work for Defendant in 1998, Zavaglia was employed in various Media jobs. Zavaglia started working in his high school media center which led to a summer job with a local theater company as a Video Consultant, freelance photography and video jobs, working on an independent film as a production assistant, and for various college media centers as a work study student and a part time employee. Zavaglia also work for several political campaigns formally and informally as a Media Consultant, he also worked for a public library as an Audio-Visual Librarian/Senior Library Assistant. He also served on the cable advisory committee in his hometown, he also worked part time for a private audio-visual company going to different hotels and sites to set up audio visual equipment, and as a hobby he would be a media program participant speaking on media psychology and media demographics, media history relating to pop culture, television, and movies. animation, and literary panels of various authors at a local science fiction convention for twenty years and almost a hundred panels. a distinct advantage of attending the convention was that between the various other panel members and attendees, Zavaglia had the opportunity to meet many media, educational, computer hardware and software professionals from educational institutions and the private sector. He would gather information of the latest developments in the tech and educational sectors some in the early concept or an early development stages. Zavaglia would research the information and go back to work and try to tell upper management what he found out to try to improve the Department with cutting edge information, he was ignored. Months and years later when upper management would inform the staff of new media concept or

equipment, Zavaglia would remind them that he spoke to them about the very same thing at an earlier time. Zavaglia would always extend himself to help students, faculty, staff, and deans both formally and informally with any aspect of their curriculum needs, whether it was helping with a student presentation or a dry run of a conference presentation by faculty or dean, Zavaglia always made himself available even if it was after his shift. Additionally, Zavaglia's mother was a nurse for 40 years before she retired, even at a young age Zavaglia would read her continuing medical education information and ask her medical questions. Also, Zavaglia, while in college, took a semester long first responder class, the triage/critical nurse that taught the class went above basic first aid course and taught it as advanced class. When Zavaglia told various staff students and faculty of his medical knowledge they would comment he was the most qualified for his position. Additionally, On or about September 3, 2003 Applicant was asked by the Department of Medical Education to be part of the Standardized Patient Interview for 3rd year student Zavaglia informed the Associate Director he would have to talk to his supervisors. He got the appropriate permissions to have me participate and help rewrite the curriculum character to make it as real as possible. Upper Management of my department had Zavaglia stop abruptly. The Associate Director sent him a letter thanking me for my contribution. also wrote a reference detailing his contribution and presentation of the scenario at a medical conference which he was not allowed to attend. The reason Medical Education wanted Zavaglia as part of this class was because one of the doctors involved examined Zavaglia and found he had back trauma which was consistent with his character in the scenario.

Also, despite the pain that was caused by medical conditions and adverse medication side effects. Still the Applicant was nominated three times in a row with multiple nominations coming from administration, faculty, staff and students each

time for an outstanding service award being the only person in his department to be nominated. On or about July 16, 2014 Plaintiff got a raise 3 months before they were terminated while on intermittent Family Medical Leave Act. On or about April 16. 2010, the applicant did have a situation where they were trying to apply for FMLA to help care for their elderly mother and was refused. "When I first inquired about the schedule change I inquired with state and federal resources targeted for elder affairs and the family medical leave act. (FMLA) I also consulted with BU Med campus human resources for guidance in this matter. When I met with upper management I explained that I had been going to my parent's house for years because of their declining heath to assist at night when I got out of work. I had proper documentation from my parent's doctor for the FMLA. It was agreed I would come in later rather than use FMLA. I was also substituting for the evening staff member who was on a three month medical leave. When the staff member returned I asked and was granted by management to come in at 11:30 am an hour later than my usual 10:30 am because I was staying several nights at my parent's house and on the other days I wanted the hour flexibility in case any issues arose. On or about February 22, 2011 the current supervisor said they were going to put me back on my schedule of 10:30am starting the next week. I was upset and I said I need to inform my family about this situation and needed some transition time. I did check with elder, legal resources, and BU Med campus human resources to make sure I knew what my status was a care giver, and no one would violate any laws or statutes concerning elderly endangerment or abandonment. It did make for a very tense atmosphere at my family meeting. During my evaluation my schedule was discussed and I am transitioning back to my original schedule." as stated above the Applicant had to transition back to their original hours, or any situation always had an overt or implied threat to the Applicant's job status if they didn't cooperate with

upper management. Zavaglia did get a master's degree from the school of education in 2008 but he started his master's degree in 2001, and was delayed in getting his degree by upper management by various excuses why Zavaglia could not go to class certain semesters because of management intimidation techniques of false accusations and would be reprimanded or was blamed for situations when he was neither at work that day of was not even part of situation at all, Zavaglia had to substitute for other department employees, who had less seniority than Zavaglia, and was given a fast track for their education while Zavaglia was doing their job during the workday by meeting with clients when the other techs left a setup or when a piece of equipment was left in a room in the early morning and Zavaglia would have to retrieve the equipment even though it was checked off the schedule as being retrieved by other employees. because of staffing transitions, he worked six semesters by himself with back issues and with no additional help, no breaks, and usually leaving late, eating his supper on the way home in his car and averaged a sixty to seventy-hour work week with no overtime pay because of being a salaried employee.

REASONS FOR GRANTING THE PETITION

This Court Must Resolve the Split Among the Circuits as to Whether its Decision in University of Texas Southwestern Medical Center v. Nassar Applies to Claims Brought Under the FMLA. The Circuit Courts are currently split, with some expressly undecided, on this critical question of whether Nassar requires a plaintiff asserting claims under the FMLA to satisfy the stricter but-for causation standard or the more lenient motivating factor standard. See Egan v. Delaware River Port Auth., 851 F.3d 263, 269-74 (3d Cir. 2017) (holding that Nassar does not impose the but-for causation standard in FMLA cases and that the mixed motive or

motivating factor standard applies instead).

Fogg v. Gonzales, 492 F.3d 447, 451 (D.C. Cir. 2007) (holding that a plaintiff asserting a claim to which the mixed motive or motivating factor standard applies need not prove pretext); Hossack v. Floor Covering Assocs. of Joliet, Inc., 492 F.3d 853, 862 (7th Cir. 2007) (identifying pretext as only one of three types of "circumstantial evidence [each of which] is sufficient in and of itself to support a judgment for the plaintiff' in an employment discrimination case); Diamond v. Colonial Life & Acc. Ins. Co., 416 F.3d 310, 318 (4th Cir. 2005) (holding that a plaintiff may survive summary judgment either by raising a genuine issue of material fact as to whether an impermissible fact motivated the employer's adverse employment decision or by proving pretext); Rachid v. Jack In The Box, Inc., 376 F.3d 305, 312 (5th Cir. 2004) (holding that a plaintiff asserting a mixed motive or motivating factor claim can survive summary judgment with proof of pretext or that "the defendant's reason, while true, is only one of the reasons for its 23 conduct, and another 'motivating factor' is the plaintiff 's protected characteristic"). As a result, this Court must grant certiorari to clarify whether the motivating factor standard applies to FMLA claims for the practical reason that the lower courts need guidance as to whether plaintiffs in these cases should be required to prove pretext.

The Court must also grant certiorari in this case because the Circuit split regarding the proper causation standard for FMLA claims involves the important question of whether the regulation promulgated by the United States Department of Labor to implement the interference and retaliation provisions of the FMLA should be accorded deference under Chevron Natural Resources Defense Council, 467 U.S. 837 (1984). See Egan, 851 F.3d at 269-74; The decisions of the Second and Third Circuits concluding that the implementing regulation in question, 29 C.F.R. § 825.220(c), should be accorded such deference

are well considered and correct. This Court must grant certiorari not only because the Eleventh Circuit refused to reach the same conclusion as the Second and Third Circuits and thereby erroneously denied Mr. Zavaglia a trial on his FMLA claims, but because Chevron deference "raises serious separation-of powers questions." Michigan v. E.P.A., 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring).13 As explained by the Second Circuit in Egan, the plain language of the FMLA provides that it is "unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this subchapter," including the right to seek or use FMLA leave, and also "for any employer to discharge or in any other manner discriminates against any individual for opposing any practice made unlawful" by the FMLA. See 851 (citing 29 U.S.C. § 2615(a)(1) and § 2615(a)(2)). The lower courts and the United States Department of Labor have interpreted these provisions as creating causes of action for interference with FMLA leave and retaliation for exercising the right to the same. See Strickland v. Water Works & Sewer Bd. of City of Birmingham, 239 F.3d 1199, 1206-07 (11th Cir. 2001). The First, Second, Seventh, Eighth, and District of Columbia Circuits hold in Title VII

cases that prima facie case combined with proof of the falsity of an employer's explanation will ordinarily, although not invariably, permit an inference of discrimination. "In Title VII cases, we have made clear that summary judgment usually 'may be defeated where "a plaintiff's prima facie case combined with sufficient evidence to find that the employer's asserted justification is false may permit the trier of fact to conclude that the employer unlawfully discriminated."'" Duzant v. Electric Boat Corp., 81 Fed.Appx. 370, 372 (2d Cir. 2003) (opinion joined by Sotomayor, J.) (emphasis added; quoting Byrnie v. Town of Cromwell, 243 F.3d 93, 102 (2d Cir. 2001)). "A plaintiff's prima-facie case, combined with sufficient

evidence to find that an employer's asserted justification is false, may permit a trier of fact to conclude that the employer unlawfully [discriminated against] the plaintiff." Rivera-Rodriguez v. Frito Lay Snacks Caribbean, 265 F.3d 15, 27 (1st Cir. 2001); see Greene v. Potter, 557 F.3d 765, 769-70 (7th Cir. 2009); Dixon v. Pulaski County Special School Dist., 578 F.3d 862, 869 (8th Cir. 2009); Also prevalent in this case are violations of the ADEA. The ADEA prohibits an employer from taking an adverse employment action "because of such individual's age" or "because" the employee opposed an unlawful practice or participated in protected activity. 29 U.S.C. § 623(a) and (d). Three more circuits have now taken sides, deepening this division among the circuits. After observing in a Title VII retaliation case that, "notably, there is a circuit split between the Fifth and Seventh Circuits on this issue," the Eleventh Circuit aligned itself with the Fifth, albeit in an unpublished decision. Saridakis v. S. Broward Hosp. Dist., 468 F. 926, 931 (11th Cir. 2012). Two other circuits have gone the other way. In a deeply divided decision, the en banc Sixth Circuit observed that "there are two ways to look at" the issue. Lewis v. Humboldt Acquisition Corp., 681 F.3d 312, 318 (6th Cir. 2012) (Sutton, J.). "One is that Price Waterhouse established the meaning of 'because of' for Title VII and other statutes with comparable causation standards. (emphasis in original). The other is by adopting the second of those views, the majority held that the ADA does not permit mixed-motive claims for the same reasons the ADEA does not. Just like the ADA and the ADEA, Title VII's retaliation provision prohibits adverse employment actions "because of" an improper purpose, with no indication that Congress intended to authorize mixed-motive claims. 42 U.S.C. § 2000e-3(a). When Congress enacted the ADA, it intended "to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(2). Similarly, in a Rehabilitation Act case, the

D.C. Circuit flatly rejected an employer's argument that an employee's request for a flexible schedule was not a request for a reasonable accommodation because "the ability to work a regular and predictable schedule is, as a matter of law, an essential element of any job." Solomon v. Vilsack, 763 F.3d 1, 10 (D.C. Cir. 2014) (internal quotation marks omitted). "That is incorrect," the court explained, because "[d]etermining whether a particular type of accommodation is reasonable is commonly a contextual and fact-specific inquiry." Id. at 9-10. The court emphasized that "nothing in the Rehabilitation Act takes" a flexible "schedule off the table as a matter of law" when considering what sort of reasonable accommodation is required. Although the ADA does not define the term "reasonable accommodation," it provides that the "term 'reasonable accommodation' may include . . . part-time or modified work schedules . . . and other similar accommodations for individuals with disabilities." 42 U.S.C. § 12111(9)(B). The statute therefore contemplates that an individual with a disability can be "otherwise qualified" even though they cannot perform the essential functions of their job at all for part of every day or for entire days at a time. See 42 U.S.C. § 12111(9); 29 C.F.R. § 1630 also outlined when the ADA was restructured with the Americans with Disabilities Act Amendments Act of 2008.

CONCLUSION

This Court must grant certiorari in this case.

Petitioner James Zavaglia was erroneously denied a trial on his claims for violation of the Family and Medical Leave Act and the ADEA act, and other discriminatory acts. This Court's precedents compel the conclusion that a plaintiff asserting these claims need only show that his use of or request for leave was one motivating factor for the adverse employment action. That shows both criminal and civil in the form

of an assault and cover up, a hostile work environment creating mental abuse and retaliation. The Petitioner was only exercising their rights under the law to resolve medical issues and age discrimination issues that were caused by the negligence of and illegal activities on the part of the Respondent. Petitioner has easily established a genuine issue of material fact on these points, and the courts below erroneously refused to analyze his claims under the proper standard and has suffered a grave miscarriage of justice and prays this Court will correct the errors below and clarify the law for the benefit of himself and all employees and employers across the country.

Respectfully submitted,
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